

**AN EVALUATION OF THE U.S. POLICY OF “TARGETED
KILLING” UNDER INTERNATIONAL LAW: THE CASE
OF ANWAR AL-AULAQI (PART I)[†]**

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During the past decade, the U.S. policy of conducting extraterritorial “Targeted Killings” against individuals linked with terrorist activities has been met with skepticism and scrutiny. However, while the strikes have followed transnational terrorists targeted by the United States into sovereign States such as Afghanistan, Pakistan, Yemen and Somalia, the United States has consistently denied any illegality, with reference to the “war against Al-Qaeda,” and their right to self-defense in the wake of 9/11. This article evaluates the U.S. legal justifications for drone strikes with reference to the highly controversial case of Anwar Al-Aulaqi, a U.S.-Yemeni citizen killed by a Predator drone on September 30, 2011, following his identification by the United States as a senior operational leader of Al-Qaeda in the Arabian Peninsula (AQAP).

Previous academic scrutiny has focused on justifying the killing within the “hostilities” paradigm of International Humanitarian Law (IHL), however this article submits that the case is instead governed by the “law enforcement” paradigm, and the stricter regime of International Human Rights Law (IHRL). Furthermore, previous scrutiny has been largely confined to hypothesizing prior to the killing itself. This two-part article will evaluate and apply the *lex lata* of international law in the circumstances prevailing during the strike.

[†] Part II will be published in Volume 44, Issue 2 of the *California Western International Law Journal*.

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The methodology adopted involves first analyzing the United States' legal justifications, before investigating the frameworks of jus ad bellum, jus in bello and IHRL, thus aiming to paint a complete picture of the legality of U.S. action. It is clear from the analysis that all three legal frameworks are facing tremendous pressure to evolve in response to the unpredictable nature of terrorist threats. However, progressive approaches to entrenched legal principles mostly fail in finding the necessary support to crystallize.

In relation to jus ad bellum, the traditional paradigm of regulating purely inter-state relations is being eroded to justify extraterritorial operations against non-state actors under the right of anticipatory self-defense. However, the strike against Al-Aulaqi appears to cross the threshold into the unlawful realms of pre-emptive self-defense. In relation to jus in bello, the entrenched geographical limitation confining non-international armed conflict to a single state precludes the United States successfully invoking a global non-international armed conflict with Al-Qaeda. Furthermore, the paucity of bilateral fighting in the state of Yemen between AQAP and the United States precludes establishing a localized non-international armed conflict. It is further clear that the United States' rationale for the strike was not to aid the Yemeni government, but to protect U.S. persons and interests. As such, IHRL must be applied based on the extraterritorial application of the International Covenant on Civil and Political Rights (ICCPR). Under this framework, there are strong arguments to find both that the United States' position rejecting the extraterritorial application of the ICCPR is misplaced, and that the strict concept of absolute necessity renders the strike unlawful.

The key underlying theme spanning all three legal frameworks is a paucity of publicly known information, compounded by decisions regarding the non-justiciability of targeting decisions. Consequently, this has resulted in a distinct lack of accountability, and this author submits that to inject legitimacy into the U.S. policy, reform is unquestionably required.

INTRODUCTION

“‘[T]argeted killing’ denotes the use of lethal force attributable to a subject of international law with the intent, premeditation and

deliberation to kill individually selected persons who are not in the physical custody of those targeting them."¹

"Targeted killing" is a concept that has developed throughout history,² and has no settled definition.³ The above quote represents the current conception of the phenomenon, as posited by International Committee of the Red Cross (ICRC) Legal Advisor Nils Melzer, and endorsed both throughout academia⁴ and by the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions.⁵

Targeted killings were historically shrouded with secrecy and of doubtful legality; however, the world is currently witnessing the "current trend toward legitimization,"⁶ with jurisdictions such as the United States, United Kingdom, Germany, Switzerland, and Israel openly admitting to such policies.⁷ The emergence of such practices into a realm of quasi-accountability has received considerable scrutiny from both academia⁸ and the UN.⁹ This article contributes to the

1. NILS MELZER, *TARGETED KILLING IN INTERNATIONAL LAW* 5 (1st ed. 2008).

2. "Targeted killing" has been known by a variety of names, such as, assassination, political murder, and tyrannicide. *Id.* at 9. "Targeted killings" do not originate from a treaty or statute. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, Int'l Law Comm'n, U.N. Doc. A/HRC/14/24/Add. 6, 3 (May 28, 2010) (by Philip Alston) [hereinafter Alston].

3. See MELZER, *supra* note 1, at 5 n.8 (noting that a number of various definitions promulgate academic literature).

4. Meagan S. Wong, Comment, *Targeted Killings and the International Legal Framework: With Particular Reference to the US Operation against Osama Bin Laden*, 11 CJIL 127, 128 (2012); Benjamin R. Farley, *Targeting Anwar Al-Aulaqi: A Case Study in U.S. Drone Strikes and Targeted Killing*, 2 AM. UNIV. NAT'L SEC. L. BRIEF 57, 60 (2012); GEOFFREY ROBERTSON QC, *CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE* 641 (4th ed. 2012).

5. Alston, *supra* note 2.

6. MELZER, *supra* note 1, at 9.

7. See generally MELZER, *supra* note 1, ch. 2, for a comprehensive discussion of the current trend towards legitimization.

8. See generally MELZER, *supra* note 1; NOAM LUBELL, *EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS* (1st ed. 2010); *TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD* (Claire Finkelstein, et al. eds., 2012).

9. See Press Release, Officer of the High Commissioner, UN Counter-Terrorism Expert to launch inquiry into the civilian impact of drones and other forms of targeted killing, U.N. Press Release (Jan. 22, 2013) (reporting that the

debate surrounding arguably the most controversial policy promulgated by any state: the U.S. policy of drone strikes.

The modern¹⁰ U.S. policy of targeted killing can be traced to the horrific acts of terrorism perpetrated on 9/11.¹¹ This policy acts as a weapon in the U.S. arsenal in combating terrorism worldwide. The policy has revolved around the use of drones (or “Unmanned Aerial Vehicles”)¹² equipped with two Hellfire missiles.¹³ These drones are controlled from thousands of miles away by the U.S. Central Intelligence Agency (CIA).¹⁴ The CIA uses drones to launch attacks against individuals in foreign states who are added to a confidential “kill list.”¹⁵ Controversially, this “kill list” has extended to the

UN Special Rapporteur on Human Rights and Counter-Terrorism, Ben Emmerson, launched an inquiry into the civilian impact of drones and other forms of targeted killing).

10. “Modern” refers to the fact that the United States has conducted various forms of targeted killings since at least World War II, with administration officials repeatedly citing the example of shooting down Japanese Admiral Yamamoto. See Eric Holder, U.S. Attorney General, Attorney General Eric Holder Speaks at Northwestern University School of Law (March 5, 2012) available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>; John Brennan, Assistant to the President for Homeland Security and Counterterrorism, The Ethics and Efficacy of the President’s Counterterrorism Strategy (Apr. 30, 2012) available at <http://www.lawfareblog.com/2012/04/brennanspeech/> [hereinafter Ethics and Efficacy].

11. Almost three thousand innocent people died in the combined terrorist attacks against the United States on September 11, 2001. 9/11 COMM’N REPORT: FINAL REPORT OF THE NAT’L COMM’N ON TERRORIST ATTACKS UPON THE UNITED STATES, at 552, n.188 (July 22, 2004).

12. The United States has conducted targeted killings via other methods, such as the assault on Osama Bin Laden’s compound on May 2, 2011, carried out by Navy SEALs, which resulted in Bin Laden’s death. Such occurrences are outside this article’s scope, but see Marko Milanovic, *Was the Killing of Osama Bin Laden Lawful?*, EJIL: Talk!, May 2, 2011, for an interesting and brief analysis of its legality.

13. See Thomas M. McDonnell, *Sow What You Reap? Using Predator and Reaper Drones to Carry Out Assassinations or Targeted Killings of Suspected Islamic Terrorists*, 44 GEO. WASH. INT’L L. REV. 243, 251-55 (2012).

14. Jo Becker and Scott Shane, *Secret ‘Kill List’ Proves A Test of Obama’s Principles and Will*, N.Y. TIMES, May 29, 2012.

15. *Id.*

targeted killing of at least one U.S. citizen abroad: Anwar Al-Aulaqi.¹⁶

The killing of Al-Aulaqi is the focal point for this article. Al-Aulaqi was a U.S.-born Imam residing in Yemen.¹⁷ Originally a prolific Al-Qaeda propagandist,¹⁸ the United States added Al-Aulaqi to its "kill list"¹⁹ after his role allegedly evolved from inspirational to operational.²⁰ Shortly after the United States added Al-Aulaqi to its "kill list," the UN identified Al-Aulaqi as a known associate of Al-Qaeda in July 2010.²¹ The UN identified Al-Aulaqi as an Al-Qaeda associate for two reasons:²² first, for his role in training the failed Detroit Christmas Day shoe-bomber Umar Farouk Abdulmutallab,²³ and second, because of his general involvement in "setting the strategic direction of AQAP."²⁴ This included recruiting, training, and planning attacks beyond the Arabian Peninsula.²⁵ After a failed attempt on his life on May 5, 2011,²⁶ a U.S. drone strike killed Al-Aulaqi on September 30, 2011.²⁷ Samir Khan, also a U.S. citizen, was

16. Tom Leonard, *Barack Obama Orders Killing of US Cleric Anwar Al-Awlaki*, THE TELEGRAPH, Apr. 7, 2010.

17. *Obituary: Anwar al-Awlaki*, BBC NEWS, Sept. 30, 2011 [hereinafter *Obituary*].

18. *Id.*

19. Leonard, *supra* note 16. The United States added Al-Aulaqi to its "kill list" on April 6, 2010. *Id.*

20. Al-Awlaki was previously described as "inspirational rather than operational." Bobby Ghosh, *How Dangerous is the Cleric Anwar Al-Awlaki?*, TIME, Jan. 13, 2010.

21. U.N. Al-Qaeda Sanctions Comm., Narrative Summaries of Reasons for Listing, U.N. DOC. QI.A.283.10 (July 20, 2010) [hereinafter Sanctions Comm.].

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* The United States labeled Al-Aulaqi as a senior operational leader of Al-Qaeda. See Elizabeth R. Wilcox (ed.), Office of the Legal Advisor, U.S. Dept. of State, *Dig. of U.S. Practice in Int'l Law* 176 (2010).

26. Margaret Coker et al., *Drone Targets Yemeni Cleric*, WSJ, May 7, 2011.

27. Martin Chulov, *Al-Qaida cleric Anwar al-Awlaki is dead, says Yemen*, THE GUARDIAN, Sept. 30, 2011. *Obituary, supra* note 17 (reporting that a CIA controlled drone carried out the strike against Al-Aulaqi's jeep in a remote part of Yemen).

killed in the same strike.²⁸ Two weeks later, Al-Aulaqi's son, 16-year old Abdulrahman, was killed in another U.S. drone strike.²⁹

After these drone attacks, the global community pressured the United States to justify its actions.³⁰ As a result of this pressure, the U.S. legal justifications for adding an individual to its kill list were revealed. These revelations have not always been voluntary.³¹ For example, in February 2013 a Department of Justice White Paper was leaked to the public.³² Whether from an administration-approved briefing or a government leak, these revelations present a picture of a government willing to add an individual to the "kill list" who poses an "imminent" threat to United States persons or interests.

This article provides an analysis of the legality of the targeted killing of Al-Aulaqi on the basis of the *lex lata* of international law. The basis of the analysis is the U.S. administration's legal justifications and the reported facts surrounding the strike. While U.S. justifications can be delineated into domestic and international law, this article focuses solely on the latter, except where overlap is necessary.³³

28. Khan was the editor of Inspire, the English language magazine published by AQAP. Saeed Kamali Dehghan, *Samir Khan Named as Second US Citizen to Die in Drone Strike*, THE GUARDIAN, Sept. 30, 2011.

29. Finn and Browning, *An American Teenager in Yemen: Paying for the Sins of His Father?*, TIME, Oct. 27, 2011.

30. See, e.g., HUMAN RIGHTS WATCH, US: END CIA DRONE ATTACKS (Dec. 19, 2011).

31. However, there have been a number of public addresses from administration officials in an attempt to show some transparency. See, e.g., Harold Koh speaks at the Annual Meeting of the American Society of International Law, Washington D.C. (Mar. 25, 2010), <http://www.state.gov/s/l/releases/remarks/139119.htm>.

32. U.S. DEP'T OF JUSTICE, WHITE PAPER, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE (2011) [hereinafter DOJ White Paper], available at <http://www.justice.gov/oip/docs/dept-white-paper.pdf>.

33. Therefore, this article does not consider whether the strike was a breach of the U.S. Presidential ban on assassinations, prohibited under Executive Order 12333. Similarly, this article does not consider whether the strike against Al-Aulaqi was constitutional. For discussion of these issues see, for example, Robert Delahunty & Christopher Motz, *Killing Al-Awlaki: The Domestic Legal Issues* (2011) U. ST. THOMAS, Legal Studies Research Paper No. 11-38.

The applicable framework of international law when considering the legality of "targeted killings" is highly debatable.³⁴ The Special Rapporteur recently concluded that, "the result has been the displacement of clear legal standards with a vaguely defined license to kill, and the creation of a major accountability vacuum."³⁵ Notwithstanding such difficulties, a paradigm of analysis must be constructed to provide the parameters of investigation in this article.

The starting point is that any extraterritorial targeted killing occurring in a foreign State triggers the *rules regarding inter-state force* (hereinafter "*jus ad bellum*"). Consequently, in the case of Al-Aulaqi, it must firstly be analyzed whether the strike was consistent with the sovereignty of Yemen. A "robust" self-defense analysis of targeted killings would end the inquiry after a successful finding that the rules of *jus ad bellum* have received compliance.³⁶ However, such a view finds nominal support³⁷ and fails to take into account the possibility of multiple layers of responsibility that may result from an unlawful killing under the frameworks of *jus ad bellum*, *jus in bello* and International Human Rights Law.³⁸

Moving forward, the law, and predictably the opinion of jurists, diverge. To adopt the reasoning of Melzer, there are two primary paradigms under which the legality of "targeted killings" may be analyzed: the "law enforcement paradigm" and the "hostilities paradigm."³⁹ The former has traditionally spoken to domestic "shoot-

34. JENNIFER ELSEA, CONG. RESEARCH SERV., *Legal Issues Related to the Lethal Targeting of U.S. Citizens Suspected of Terrorist Activities* (2012).

35. Alston, *supra* note 2, at 3.

36. Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law* (Brookings Inst., Working Paper 2009).

37. JORDAN PAUST, SELF-DEFENSE TARGETINGS OF NON-STATE ACTORS AND PERMISSIBILITY OF U.S. USE OF DRONES IN PAKISTAN, 19 J. TRANSNAT'L L. & POL'Y 237, 241-42 (2010).

38. See JAMES CRAWFORD, ILC ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES, 166-67 (2002) ("that is not to say that self-defense precludes the wrongfulness of conduct in all cases or with respect to all obligations. Examples relate to international humanitarian law and human rights obligations . . . As to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defence does not preclude the wrongfulness of conduct.").

39. MELZER, *supra* note 1, at 44.

to-kill”⁴⁰ and “final rescue shot”⁴¹ policies, where the sole operative body of law is IHRL. The latter traditionally speaks to the rules governing the existence and regulation of armed conflicts, known collectively as the rules of *jus in bello*. However, against the backdrop of globalization and the ever-increasing universality of rights, the clear division between “law enforcement” and “hostilities” has been eroded.⁴² The resulting concept of Melzer’s “normative paradigm of hostilities” reflects the consensus that IHRL maintains applicability, subject to the *lex specialis* rule, during times of armed conflict.⁴³ In the case of Al-Aulaqi, an underlying problem which has divided academics is whether to classify the strike in the context of “law enforcement”⁴⁴ or as part of an armed conflict and thus under the “hostilities” paradigm.⁴⁵

The underlying argument forwarded is that it is ultimately the frameworks of *jus ad bellum* and IHRL that are applicable to the strike against Al-Aulaqi.⁴⁶ The methodology adopted in this two-part article involves setting out the U.S. legal position in Chapter I, before considering all three aforementioned international legal frameworks in Chapters II-IV. Part I covers Chapters I-II, while Part II will follow with Chapters III-IV, before providing an overall conclusion on the strike’s legality. In doing so, this article aims not only to provide a complete analysis under international law, but also to contribute to the debate surrounding the death of Al-Aulaqi by considering the new arguments voiced in the DOJ White Paper, alongside arguments surrounding the applicability of IHRL that have yet to receive the

40. MELZER, *supra* note 1, at 22.

41. *Id.* at 10, 18.

42. The International Court of Justice has held that the IHRL was applicable in times of both war and peace. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 104-106 (July 9) [hereinafter “Wall Advisory Opinion”].

43. MELZER, *supra* note 1, at 243.

44. See, e.g., Michael Ramsden, *Targeted Killings and International Human Rights Law: The Case of Anwar Al-Awlaki*, 16(2) J. CONFLICT & SEC. LAW 385 (2011).

45. See, e.g., Farley, *supra* note 4, at 57.

46. As such, the substantive rules of IHL are outside this article’s scope. See Int’l Comm. of the Red Cross, *Customary Int’l Humanitarian Law* (2005) (Jean-Marie Henckaerts and Louise Doswald-Beck) for a comprehensive study of customary IHL completed by the ICRC.

necessary academic scrutiny. Furthermore, because the majority of the academic debate surrounding the targeting of Al-Aulaqi pre-dates the incident itself,⁴⁷ new arguments must be considered regarding the application of the law in the circumstances prevailing at the time of death. It may indeed be true that the U.S. drone strikes are "establishing precedents that other nations may follow."⁴⁸ However, if precedents are indeed being established, it is crucial that they are established in conformity with the fundamental principles of international law so the world avoids the last century's mistakes.⁴⁹

I. FROM "THE GLOBAL WAR ON TERROR" TO "THE WAR AGAINST AL-QAEDA": AN ANALYSIS OF THE U.S. LEGAL JUSTIFICATIONS

*We are a nation at war . . . But just as surely as we are a nation at war, we also are a nation of laws and values.*⁵⁰

In analyzing the legality of the targeted killing of Anwar Al-Aulaqi, Chapter I considers the legal justifications that the U.S. Administration uses as authority for the strike. In doing so, this chapter considers both the domestic and international justifications in light of the recently leaked DOJ White Paper,⁵¹ alongside remarks from the previous two U.S. administrations, to paint a complete picture of how the United States has developed its current position on targeted killing.

The most authoritative source of U.S. legal justification is the leaked DOJ White Paper, which outlines "the circumstances in which the U.S. government can use lethal force in a foreign country outside the area of active hostilities against a U.S. citizen who is a senior operational leader of Al-Qaeda or an associated force."⁵² In summary,

47. See, e.g., Ramsden, *supra* note 45; Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, 13 Y.B. INT'L HUMANITARIAN L. 3-60 (2010).

48. Ethics and Efficacy, *supra* note 10.

49. McDonnell, *supra* note 13, at 245 (noting that 1.5 million civilian casualties resulted from indiscriminate bombing in WW2).

50. Holder, *supra* note 10.

51. DOJ White Paper, *supra* note 32.

52. *Id.* at 1.

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three cumulative conditions must be met before lethal force can be used:

(1) an informed, high-level official of the U.S. government has determined that the targeted individual poses an imminent threat of violent attack against the United States;

(2) capture is infeasible, and the United States continues to monitor whether capture becomes feasible; and

(3) the operation would be conducted in a manner consistent with applicable law of war principles.⁵³

In enunciating this three-stage test, the United States justifies its policy with numerous domestic and international authorities and doctrines.

A. Domestic Justification

The primary source of domestic authority cited on numerous⁵⁴ occasions by the United States is the Authorization for Use of Military Force (AUMF).⁵⁵ The AUMF provides:

That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.⁵⁶

Consideration of the AUMF is integral to examining IHRL. However, this article does not include further consideration of domestic authorities, such as the legal effects of U.S. citizenship and constitutional rights. Nevertheless, it must briefly be noted that the U.S. standpoint is that neither citizenship⁵⁷ nor the Due Process

53. DOJ White Paper, *supra* note 32, at 1; *See also* Holder, *supra* note 10.

54. Harold Koh, *supra* note 31; Holder, *supra* note 10.

55. Passed by Congress within one week of 9/11. Authorization for Use of Military Force, PL 107-40 [S.J. Res 23].

56. *Id.* § 2(a).

57. “Belligerents who also happen to be U.S. citizens do not enjoy immunity where non-citizen belligerents are valid military objectives.” Jeh Johnson, Nat’l Sec. L., Lawyers and Lawyering in the Obama Admin., speech to Yale Law School (Feb.

Clause of the Fifth Amendment of the U.S. Constitution⁵⁸ prevent the strike against Al-Aulaqi.⁵⁹

B. *International Justification*

The United States recognizes that "targeted killings" cannot be considered a purely domestic affair outside the scope of international law.⁶⁰ Consequently, the United States also justifies its practice of "targeted killings" under international law. Underlying these international justifications, the United States has acknowledged the difficulties of formulating foreign policy in light of the challenges posed by Al-Qaeda.⁶¹ The United States has repeatedly reaffirmed its commitment to the rule of law⁶² and conventional legal principles⁶³ in meeting those challenges.

The U.S. international justifications can be analyzed under the methodology promulgated by John Brennan in his speech at the Woodrow Wilson International Centre for Scholars.⁶⁴ Brennan suggested that "targeted killings" should be used because they are legal, ethical, and wise.⁶⁵ While wisdom is a question devoid of legal significance for present purposes,⁶⁶ the legality and ethicality of

22, 2012), <http://www.cfr.org/national-security-and-defense/jeh-johnsons-speech-national-security-law-lawyers-lawyering-obama-administration/p27448>.

58. The clause provides, *inter alia*, that "No person shall be . . . deprived of life, liberty, or property, without due process of law." However, Attorney General Holder has stated that due process does not equal *judicial* process. Holder, *supra* note 10.

59. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C., 2010) (noting that this issue is non-justiciable).

60. U.N. Charter art. 2, para 7.

61. Koh, *supra* note 31 (drawing an analogy with "driving the roundabout near the Coliseum in Rome").

62. *Id.* (citing President Barack Obama, A Just and Lasting Peace, Nobel Lecture in Oslo, (Dec. 10, 2009), http://www.nobelprize.org/nobel_prizes/peace/laureates/2009/obama-lecture_en.html).

63. Johnson, *supra* note 58.

64. Ethics and Efficacy, *supra* note 10.

65. *Id.*

66. Although it is accepted that wisdom may be a pertinent consideration in theories of compliance with international legal obligations. *See, e.g.*, Andrew T. Guzman, *A Compliance Based Theory of International Law*, 90 CAL. L. REV. 1823 (2002).

targeted killings can be equated to the legal frameworks of *Jus ad Bellum* and *Jus in Bello*, respectively.

1. *Legal – Jus ad Bellum*

“The jus ad bellum (law on the use of force) or jus contra bellum (law on the prevention of war) seeks to limit resort to force between States.”⁶⁷ Under this legal framework, the United States accepts that there are limits to extra-territorial force regarding state sovereignty that must be observed.⁶⁸ Therefore, the United States has justified its actions under its “inherent right to national self-defense in international law” under Article 51 of the UN Charter,⁶⁹ resulting from the “undisputed act of aggression” perpetrated by Al-Qaeda on 9/11.⁷⁰ However, as a framework professing to govern the recourse to force between *States*, Chapter II addresses whether self-defense may be invoked against non-state actors.

Assuming Article 51 of the UN Charter justifies U.S. action against non-state actors, the U.S. interpretation of the parameters of self-defense has bred controversy, with Brennan acknowledging that the legality of U.S. drone strikes under *jus as bellum* rests on the definition of “imminence.”⁷¹ No aspect of U.S. policy has proved more controversial than the conception of “imminence” promulgated under the “Bush Doctrine” of pre-emptive self-defense.⁷² The “Bush

67. Int’l Comm. of the Red Cross, *IHL and other legal regimes – jus ad bellum and jus in bello*, ICRC.ORG (Oct. 29 2010), <http://www.icrc.org/eng/war-and-law/ihl-other-legal-regimes/jus-in-bello-jus-ad-bellum/overview-jus-ad-bellum-jus-in-bello.htm> [hereinafter *IHL and other legal regimes*].

68. Johnson, *supra* note 57.

69. DOJ White Paper, *supra* note 32, at 2 (citing U.N. Charter, art. 51) (also justifying the targeted killings of Americans in foreign countries on the President’s “constitutional responsibility to protect the nation”). *Id.*

70. John Brennan, Strengthening our Security by Adhering to our Values and Laws (Sept. 16, 2011), <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>.

71. *Id.*

72. HEIKO MEIERTONS, *THE DOCTRINES OF U.S. SECURITY POLICY: AN EVALUATION UNDER INTERNATIONAL LAW* 179-224 (1st ed. 2010).

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Doctrine" formally emerged in the NSS published by the White House just over a year after 9/11.⁷³

The National Security Strategy provides, in pertinent part, that the U.S. will disrupt and destroy terrorist organizations by . . . defending the United States, the American people and our interests at home and abroad by identifying and destroying the threat before it reaches our borders. . . we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting *pre-emptively* against such terrorists, to prevent them from doing harm against our people and our country.⁷⁴

While the 2010 NSS removed the phrase "pre-emptively,"⁷⁵ the Obama Administration has continued to promulgate a broad conception of "imminence," most notably in the DOJ White Paper. With regard to senior operational leaders like Al-Aulaqi, the DOJ White Paper clarifies that "imminence" "does not require clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future."⁷⁶ The United States cites the unpredictable and sporadic nature of terrorist activities to support the conclusion that the criterion of imminence can be fulfilled where an individual is "an operational leader of Al-Qaeda or an associated force and is personally and continually involved in planning terrorist attacks against the United States."⁷⁷ Additionally, an Al-Qaeda member recently involved in activities posing an imminent threat of attack against the U.S., and who has not renounced such activities, may be

73. NATIONAL SECURITY STRATEGY 2002, NATIONAL SECURITY STRATEGY ARCHIVE, <http://nssarchive.us> (last visited Mar. 30, 2013) [hereinafter "NSS 2002"]. The NSS is a document required, by the Goldwater-Nichols Act 1986, to be submitted each year to Congress by the U.S. President to set out the U.S. foreign and security policy for that year. President Obama has not submitted since 2010. *Id.*; See also President George W. Bush, President Bush Delivers Graduation Speech at West Point (June 1, 2002), <http://georgewbush-whitehouse.archives.gov/news/releases/2002/06/20020601-3.html> (President Bush enunciating the "Bush Doctrine").

74. NSS 2002, *supra* note 74 (emphasis added).

75. NATIONAL SECURITY STRATEGY 2010, NATIONAL SECURITY STRATEGY ARCHIVE, <http://nssarchive.us> (last visited Mar. 30, 2013) [hereinafter "NSS 2010"].

76. DOJ White Paper, *supra* note 32, at 7.

77. *Id.* at 8.

targeted.⁷⁸ Chapter II of this article addresses the legal validity of this definition of imminence and its application to the Al-Aulaqi case.

Furthermore, the United States has also justified inter-State force where either the territorial State consents to the force or “after a determination that the nation is *unable or unwilling* to deal with a threat to the United States.”⁷⁹ The former justification was rightfully unquestioned. However, academia questioned whether the UN Charter supported the latter justification.⁸⁰ Despite these reservations, Brennan continued to rely on the latter justification to support U.S. drone strikes in foreign States.⁸¹ Additionally, the DOJ White Paper appears to incorporate this justification into the inherent right of the United States to self-defense.⁸²

2. Ethical – *Jus in Bello*

“[*Jus in Bello*] addresses the reality of a conflict without considering the reasons or legality for using force. It regulates only those aspects of the conflict which are of humanitarian concern.”⁸³ First, it must be emphasized that the framework of *jus in bello* operates separately to *jus ad bellum*; legality under the latter does not equate to legality under the former.⁸⁴ *Jus in bello* regulates the situations where States can legitimately claim to be in an armed conflict with an enemy. If an armed conflict can be established, then the rules of IHL must be applied.⁸⁵ The primary benefit associated with triggering the applicability of IHL is that it provides a more

78. DOJ White Paper, *supra* note 32, at 8.

79. Holder, *supra* note 10.

80. Kevin Jon Heller, *The “Unwilling or Unable” Standard for Self-Defense*, OPINIO JURIS (Sept. 17, 2011, 2:42 AM), <http://opiniojuris.org/2011/09/17/the-unwilling-or-unable-standard-for-self-defense-against-non-state-actors/> (critiquing the first unofficial enunciation of this policy).

81. Ethics and Efficacy, *supra* note 10.

82. DOJ White Paper, *supra* note 32, at 5.

83. *IHL and other legal regimes*, *supra* note 68.

84. Alston, *supra* note 2, at 12.

85. Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib.1 for the Former Yugoslavia Oct. 2, 1995).

permissive framework to determine the legality of an operation. Therefore, it is not surprising that the U.S. has attempted to incorporate its campaign of drone strikes into the context of armed conflict.

Initially, the United States supported drone strikes with the assertion that they were part of the War on Terror.⁸⁶ However, the United States claimed its War on Terror was not an international or non-international armed conflict, which consequently denied designated terrorists the invocation of protections afforded under the Geneva Conventions.⁸⁷ The imprecise and non-legalistic terminology of the War on Terror was criticized⁸⁸ and the rhetoric quickly shifted to a "war with terrorist organizations"⁸⁹ or a "war with Al-Qaeda."⁹⁰

The Obama administration tried to avoid using such legally uncertain phrases⁹¹ and adopted the position that the United States is engaged in armed conflicts across Iraq, Afghanistan, and with the non-state actor, Al-Qaeda.⁹² The DOJ White Paper cites the U.S. Supreme

86. President George W. Bush, Address to a joint session of Congress (Sept. 20, 2001), <http://edition.cnn.com/2001/US/09/20/gen.bush.transcript/>. The War on Terror began with the terrorist attacks against the U.S. on September 11, 2001. Alberto R. Gonzales, Counsel to the President, Speaking before the American Bar Assoc. Standing Committee on Law and Nat'l Sec. 5 (Feb. 24, 2004) <http://www.fas.org/irp/news/2004/02/gonzales.pdf>.

87. "Al Qaeda is an international terrorist group and cannot be considered a state party to the Geneva Convention. Its members, therefore, are not covered by the Geneva Convention, and are not entitled to POW status under the treaty." Ari Fleischer, White House Press Secretary, Statement by the Press Secretary on the Geneva Convention (May 7, 2003) <http://georgewbush-whitehouse.archives.gov/news/releases/2003/05/20030507-18.html>.

88. See, e.g., Sean D. Murphy, *International Law the United States, and the Non-Military 'War' Against Terrorism*, 14 E.J.I.L. 347-64 (2003).

89. Secretary of Defense Donald Rumsfeld, Forward to Chairman of the Joint Chiefs of Staff, National Military Strategic Plan for the War on Terrorism at 1 (Feb. 1, 2006), <http://www.defense.gov/pubs/pdfs/2006-01-25-Strategic-Plan.pdf>.

90. Gonzales, *supra* note 87, at 5.

91. Lubell, *supra* note 8, at 113 (citing Oliver Burkeman, *Obama Administration says goodbye to 'war on terror': US defence department seems to confirm use of the bureaucratic phrase 'overseas contingency operations'* THE GUARDIAN, Mar. 25, 2009).

92. See Koh, *supra* note 31; DOJ White Paper, *supra* note 32; see also NSS 2010, *supra* note 76, at 20 (stating that "this is not a global war against a tactic—terrorism or a religion—Islam. We are at war with a specific network, al-

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Court's decision in *Hamdan v. Rumsfeld* to support the proposition that the United States is "currently in a non-international armed conflict with Al-Qaeda and its associated forces."⁹³ With this justification, the White Paper rebukes arguments that the conflict between the United States and Al-Qaeda cannot extend to nations outside "hot" battlefields, such as Afghanistan.⁹⁴ The White Paper states that while there is no authoritative precedent in international law,⁹⁵ an operation against a senior operational leader of Al-Qaeda

in a location where [Al-Qaeda] or an associated force has a significant and organized presence and from which al-Qa'ida . . . plan[s] attacks against U.S. persons and interests, the operation would be part of the non-international armed conflict between the United States and al-Qa'ida that the Supreme Court mentioned in *Hamdan*.⁹⁶

Consequently, Chapter III will address the legitimacy of the claim that the Al-Aulaqi strike was within the context of an armed conflict with the stateless, shifting entity that is Al-Qaeda, subject to no geographical boundaries.

3. *The Missing Link – IHRL*

During the last 10 years, the United States has not considered that drone strikes are outside the context of armed conflict, and are therefore governed by IHRL's law enforcement paradigm.⁹⁷ Consequently, the United States has not considered the IHRL, even in the recently leaked White Paper.⁹⁸ Chapter III of this article will

Qa'ida, and its terrorist affiliates who support efforts to attack the United States, our allies, and partners").

93. DOJ White Paper, *supra* note 32, at 3 (citing *Hamdan v. Rumsfeld*, 548 U.S. 557, 628-31 (2006)).

94. *Cf.* Mary Ellen O'Connell, *Combatants and the Combat Zone*, 43 U. RICH. L. REV 845, 857-59 (2009).

95. DOJ White Paper, *supra* note 32, at 4.

96. *Id.* at 5.

97. ELSEA, *supra* note 34, at 20.

98. *See* David Kaye, *International Law Issues in the Department of Justice White Paper on Targeted Killing*, 17 AM. SOC'Y OF INT'L L. (Feb. 15, 2013) available

provide that despite the United States' lack of consideration, there are strong arguments that the Al-Aulaqi killing was indeed outside of the context of armed conflict, meaning that the United States must consider the framework and application of IHRL.

The United States takes the position that the IHRL does not apply to killings outside of the United States.⁹⁹ Yet, this argument is often made and accepted without justification. Chapter IV will explore the arguments underlying this position, before considering the application of IHRL to the Al-Aulaqi strike.

C. Conclusion

The preceding analysis considered the U.S. domestic and legal justifications for the targeted killing policy. It is clear that, in matters such as the U.S. conception of "imminence" and the geographical reach of armed conflict, the United States is proposing interpretations that are progressive and in response to the fluid challenge of terrorism perpetrated by transnational non-state actors. However, the following chapters consider whether such interpretations are reconcilable with the *lex lata* of each framework. After constructing each framework, the focus turns to the application to the Al-Aulaqi killing.

II. JUS AD BELLUM: SELF-DEFENSE AND THE SOVEREIGNTY OF YEMEN

After considering the legal justifications put forth by the United States, the second stage in analyzing the targeted killing of Anwar Al-Aulaqi is to establish that the incursion into the sovereign territory of Yemen was justifiable under the rules of *jus ad bellum*. This chapter considers the fundamental prohibition of the use of inter-State force and explores the options for legitimizing force, specifically focusing on the U.S. legal justification, the inherent right of national self-defense.

at <http://www.asil.org/insights/volume/17/issue/8/international-law-issues-department-justice-white-paper-targeted-killing>.

99. Kevin Jon Heller, 'One Hell of a Killing Machine': Signature Strikes and International Law, 89 J. INT'L CRIM. JUSTICE 89, 112 (2013); Arabella Thorpe, *Drone Attacks and the Killing of Anwar Al-Aulaqi*, House of Commons Standard Note 06165 13 (Dec. 20, 2011).

A. Prohibition on the Use of Force

The cardinal rule of *jus ad bellum*¹⁰⁰ is that “[States] shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.”¹⁰¹ Under a literal reading, there may be the temptation to argue that “short swift operations not involving prolonged presence . . . do not interfere with the territorial integrity or the political independence [of Yemen],”¹⁰² thus rendering the drone strike against Al-Aulaqi lawful. However, the International Court of Justice (ICJ) has repeatedly rejected such a narrow literal reading¹⁰³ and could be deemed contrary to the object and purpose of the UN Charter,¹⁰⁴ leading to the strong and dominant viewpoint that *all* force is *prima facie* unlawful.¹⁰⁵

An extraterritorial use of force in another sovereign state may only be legitimized by the State’s consent¹⁰⁶ or the Charter’s exceptions, namely the exercise of self-defense¹⁰⁷ or with Security Council authorization.¹⁰⁸

100. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 190 (June 27) [hereinafter Nicaragua]; Reports of the Commission to the General Assembly, *Draft Articles on the Law of Treaties with Commentaries* 187, 247 (1966); CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 49 (3d ed. 2008) (as enunciated in U.N. Charter, art. 2, para. 4 and subsequently confirmed as a principle of customary international law and *jus cogen* norm).

101. U.N. Charter, art. 2, para. 4.

102. Lubell, *supra* note 8, at 27 (emphasis added).

103. Corfu Channel Case (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, 24 (Apr. 9); Nicaragua, *supra* note 101, at 106-08, ¶¶ 202-205.

104. Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331. The “object and purpose” of the U.N. Charter is “to maintain international peace and security.” U.N. Charter, art. 1, para. 1.

105. YORAM DINSTEIN, WAR, AGGRESSION, AND SELF DEFENCE (5th ed., Cambridge University Press, 2011), 89-90; Lubell, *supra* note 8, at 27-28; Malcolm Shaw, *International Law* (6th ed. 2008), 1127; JAMES CRAWFORD, BROWNLIE’S PRINCIPLES OF PUB INT’L L 747 (8th ed.) [hereinafter BROWNLIE’S].

106. Accepted by the ICJ in *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, ICJ Reports 2005, p. 168, p. 198-99 [hereinafter *Armed Activities*].

107. U.N. Charter, at art. 51.

108. *Id.*, art. 42.

It is accepted that there is a remote possibility that consent was given, especially noting the various forms of aid the United States provided to Yemen since 2006.¹⁰⁹ However, neither the United States nor Yemen has publically indicated¹¹⁰ that Yemen consented to the strike.¹¹¹ Furthermore, the argument that UN Security Council Resolutions 1368 and 1373 authorized the perpetual unilateral use of force in all States where terrorists are present¹¹² faces skepticism throughout academia.¹¹³ Additionally, this argument arguably seeks to undermine the *raison d'être* of Article 2(4), namely the non-proliferation of force.¹¹⁴ Therefore, the following discussion focuses on the primary justification forwarded by the United States: that the strike was justified under the U.S.' inherent right of self-defense.

B. Self-Defense

Article 51 of the UN Charter states that:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council

109. JEREMY SHARP, CONG. RESEARCH SERV., RL34170, Yemen: Background and U.S. Relations 12-20 (2012).

110. Alston recommends that to legitimize a targeted killing by consent, there must be a public indication by the territorial State. Alston, *supra* note 2, at 27.

111. Thorp, *supra* note 100, at 9. It should also be noted that the U.S. supported Gulf-Cooperation Council brokered transition plan following the "Arab Spring" was only entered 2 months after the killing of Al-Aulaqi. SHARP, *supra* note 109, at 4.

112. Jordan Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq and Beyond*, 35 CORNELL INT'L L.J. (2002) 533, 544-45 [hereinafter *Use of Armed Force*].

113. Michael Byers, *Terrorism, the Use of Force and International Law after 11 September*, 51 ICLQ 401, 402, 412 (2002); Chris Downes, 'Targeted Killings' in an Age of Terror: The Legality of the Yemen Strike, 9 J. CONFLICT & SECURITY L. 277, 286-87 (2004); McDonnell, *supra* note 13, at 269.

114. Albrecht Randelzhofer & Oliver Dorr, *Article 2(4)*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 200, 215-16 (Bruno Simma et al. eds., 3d ed. 2012).

has taken measures necessary to maintain international peace and security.¹¹⁵

Jus ad bellum is traditionally a framework governing inter-state relations, but has been used by the United States since 9/11 to support its use of force against non-state actors, namely Al-Qaeda. This application has resulted in a deep “doctrinal divide”¹¹⁶ between those favoring a traditional, restrictive approach to self-defense, based in Article 51,¹¹⁷ and those advocating a progressive, wider approach, drawing support from the parallel doctrine of self-defense under customary international law to meet the fluid and unpredictable threat from non-state actors perpetrating terrorist activities.¹¹⁸

1. *Self-Defense and Non-State Actors*

The primary question is whether the strike in Yemeni territory against non-state actors can be justified by invoking the U.S.’ right to self-defense. The first area of consideration is the jurisprudence of the ICJ. On one hand, the more traditional, restrictive approach is the position adopted by the majority in two significant cases. In both the *Nicaragua Case*¹¹⁹ and the *Wall Advisory Opinion*,¹²⁰ the ICJ held that self-defense must be in response to an armed attack attributable either

115. U.N. Charter, art. 51.

116. Daniel Bethlehem, *Principles Relevant to the Scope of a State’s Right of Self-Defence Against an Imminent or Actual Armed Attack by Non-State Actors* 106 AM. J. INT’L L. 770, 769-777, 773 (2012); GRAY, *supra* note 101, at 201.

117. See, e.g., BROWNIE’S, *supra* note 106, at 773.

118. See, e.g., Bethlehem, *supra* note 117, at 773; CHRISTOPHER GREENWOOD, INTERNATIONAL LAW AND THE PRE-EMPTIVE USE OF FORCE: AFGHANISTAN, AL-QAIDA AND IRAQ, 4 SAN DIEGO INT’L L.J. 7, 17 [hereinafter PRE-EMPTIVE USE OF FORCE].

119. Nicaragua, *supra* note 101, at 103, para. 195 (noting that “The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the *sending by a State of armed bands to the territory of another State*, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regulars armed forces”) (emphasis added).

120. Wall Advisory Opinion, *supra* note 43, ¶ 139.

directly¹²¹ or indirectly¹²² to a State. This article takes the position that Yemen did not attack the United States or provide any support to AQAP. Based on this position, there is no rational argument about attribution, and under this view there could be no possibility of invoking self-defense.

However, jurists have shown distaste for the superficial treatment given to the question in the *Wall Opinion*,¹²³ which simply states that "Article 51 of the Charter thus recognizes the existence of an inherent right of self-defense in the case of armed attack *by one State against another State*,"¹²⁴ with no further reasoning. In the *Wall Opinion*, Judges Higgins,¹²⁵ Kooijmans¹²⁶ and Buergenthal¹²⁷ challenged the majority, with Buergenthal stating that Article 51 "does not make its exercise dependent upon an armed attack by another State,"¹²⁸ and that the Security Council, in reaffirming the right, never placed this limit.¹²⁹ Judge Kooijmans once again argued the merits of his position in his Separate Opinion to *Democratic Republic of Congo v. Uganda*, stating that "it would be unreasonable to deny the attacked state the right to self-defense merely because there is no attacker State, and the

121. Articles 4 and 5 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts define when the conduct of a state organ or persons exercising governmental authority will be directly attributed to the state. Draft Articles on Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, UN GAOR, 56th Sess. Supp. No. 10 at 43, U.N. Doc. A/56/83 (Dec. 12, 2001).

122. Conduct of person or group of persons under direction or control of state. *Id.* art. 8.

123. BROWNIE'S, *supra* note 106, at 771; Iain Scobbie, *Words My Mother Never Taught Me – "In Defence of the International Court"*, 99 AJIL 76, 87 (2005); *see also* Sean Murphy, *Self-Defense and the Israeli Wall Advisory Opinion – An Ipse Dixit from the Court?*, 99 AJIL 62, 62 (2005); GRAY, *supra* note 101, at 135.

124. Wall Advisory Opinion, *supra* note 43, at ¶ 139 (emphasis added).

125. *Id.* ¶¶ 33-34 (separate opinion of Judge Higgins).

126. *Id.* ¶ 35 (separate opinion of Judge Kooijmans).

127. *Id.* ¶ 6 (declaration of Judge Buergenthal).

128. *Id.*

129. *Id.* (referencing S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001) and S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sep. 28, 2001)).

Charter does not so require,”¹³⁰ even though the majority of the Court sidestepped the issue.¹³¹

ICJ jurisprudence is not conclusive on the right of self-defense against non-state actors, highlighting the need for further investigation. It is thus instructive to consider whether there is the necessary uniformity of state practice and *opinio juris* to support the existence of a right to self-defense against non-state actors under customary international law. Historically, the customary right of self-defense derives from the Caroline incident of 1837.¹³² In this incident, British subjects destroyed the *Caroline* after discovering it was providing arms and supplies to Canadian rebels. Therefore, there is clear evidence to show that prior to the Charter era the right of self-defense against non-state actors was accepted by states such as the United Kingdom and United States.¹³³ While *Nicaragua* clearly stated that “it cannot . . . be held that article 51 is a provision which “subsumes and supervenes” customary international law,”¹³⁴ questions remain as to whether the original scope of the right survived the passing of the U.N. Charter.¹³⁵

In the Charter era prior to 9/11, State practice against non-state actors has been portrayed to be sparse and generally negative,¹³⁶ noting only a handful of notable incidents, such as the U.S. strike against Libya in 1986 in response to the Libyan-sponsored terrorist attacks on U.S. nationals abroad,¹³⁷ and the U.S. missile strikes against Iraq in 1993 in response to a failed assassination attempt on

130. *Armed Activities*, *supra* note 107, ¶ 30 (separate opinion of Judge Kooijmans).

131. The majority reasoned that its consideration was not necessary following a conclusion on the attribution of armed attacks to the Democratic Republic of the Congo. *Id.* ¶¶ 146-147. This has led some to argue that the self-defense against non-state actors is not necessarily precluded in the eyes of the court. Wong, *supra* note 4, at 136.

132. R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AJIL 82 (1938); Shaw, *supra* note 106, at 1131.

133. PRE-EMPTIVE USE OF FORCE, *supra* note 119, at 17.

134. *Nicaragua*, *supra* note 100, ¶ 176.

135. The U.N. Charter passed into force on Oct. 29, 1945. U.N. Charter, *supra* note 60.

136. BROWNIE’S, *supra* note 106, at 772.

137. GRAY, *supra* note 101, at 196 (noting that the U.S. strikes in Libya were in response to the Libyan-sponsored terrorist attacks on U.S. nationals abroad).

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George Bush.¹³⁸ However, notwithstanding the paucity of practice, neither of these incidents received condemnation for being against non-state actors, but for other grounds, such as the former being disproportionate.¹³⁹

The catalyst for State action against non-state actors was 9/11. However, State practice has been primarily that of the United States, carrying out full military operations against non-state actors in Afghanistan and Iraq, alongside drone strikes in Yemen, Pakistan, and Somalia. The United States views 9/11 as an armed attack to which it is entitled to respond with force.¹⁴⁰ Similar supporting *opinio juris* can be identified in the response of the international community. In the period following the attacks, the UN General Assembly emphatically condemned the attack¹⁴¹ and the Security Council has on two occasions, in Resolutions 1368¹⁴² and 1373,¹⁴³ recognized the U.S.' right to defend itself.¹⁴⁴ Additionally, the North American Treaty Organization ("NATO") recognized the 9/11 terrorist attacks as an armed attack,¹⁴⁵ and for the first time in its history declared NATO's right of collective self-defense.¹⁴⁶

Whether such State practice and *opinio juris* is conclusive evidence of the customary right of self-defense against non-state actors is a matter of interpretation. Even conceding that the pre-9/11 State practice is inconclusive, regarding the legality of attacks against non-state actors, there are unique arguments about the instant

138. *Id.* at 196-97 (noting the U.S. missile strikes were in response to a failed assassination attempt on then President George Bush).

139. BROWNLIE'S, *supra* note 106, at 772.

140. *See* NSS 2002, *supra* note 74, at 15.

141. General Assembly Res. 56/1 (2001).

142. S.C. Res. 1368, *supra* note 130 ("[r]ecognizing the inherent right of individual or collective self-defense in accordance with the Charter").

143. S.C. Res. 1373, *supra* note 130.

144. Thomas Franck, *Editorial Comments: Terrorism and the Right of Self-Defense*, 95 AJIL 839, 840 (2001).

145. NATO Press Release, *Statement by the North Atlantic Council* (Sept. 12, 2001), available at <http://www.nato.int/docu/pr/2001/p01-124e.htm>.

146. GRAY, *supra* note 101, at 193.

crystallization¹⁴⁷ of customary international law on 9/11, or in the weeks following 9/11 where the Security Council recognized the right of self-defense against non-state actors; a so-called “Grotian Moment.”¹⁴⁸ It could alternatively be argued, consistent with the *North Sea Continental Shelf* case,¹⁴⁹ that in the 10 years between 9/11 and Al-Aulaqi’s killing, the rule of custom crystallized on the basis of Article 51.

Nevertheless, since the ICJ in both *Nicaragua* and the *Wall Advisory Opinion* held that self-defense is a right *vis-à-vis* States, and other influential commentators, such as Crawford,¹⁵⁰ maintain strong opposition, the United States may have the burden of rebutting the majority in the *Wall Opinion* to establishing its right of self-defense against non-state actors. However, there is overwhelming support from learned jurists such as Gray,¹⁵¹ Franck,¹⁵² Dinstein,¹⁵³ Greenwood,¹⁵⁴ Paust,¹⁵⁵ and Bethlehem¹⁵⁶ for the proposition that the

147. As with State practice, crystallization is a widespread term within international law regarding the moment a purported “rule” of customary international law actually becomes a rule in the sense of creating obligations.

148. Ramsden, *supra* note 45, at 391 (citing Michael Scharf, *Seizing the “Grotian Moment”: Accelerated Formation of Customary International Law in Times of Fundamental Change*, 43 CORNELL INT’L L.J. 439 (2010)). This author notes that the original argument of Scharf regarded a “Grotian Moment” in respect to Joint Criminal Enterprise (JCE) in International Criminal Law. Scharf, *supra* at 440-43. Scharf uses the term to denote “a paradigm-shifting development in which new rules and doctrines of customary international law emerge with unusual rapidity and acceptance.” *Id.* at 439-41. The argument follows that 9/11 is such a development.”

149. *North Sea Continental Shelf*, Judgment, 1969 I.C.J. ¶ 74 (providing that “a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule [provided that] State practice, including that of States whose interests are specially affected, [is] both extensive and virtually uniform”).

150. BROWNIE’S, *supra* note 106, at 773.

151. Albeit acknowledging that there are difficulties in establishing its scope; GRAY, *supra* note 100, at 199 (also acknowledging there are difficulties in establishing the scope of a State’s right to act in self-defense).

152. Franck, *supra* note 145, at 840.

153. DINSTEIN, *supra* note 106, at 224-25.

154. PRE-EMPTIVE USE OF FORCE, *supra* note 119, at 17.

155. *Use of Armed Force*, *supra* note 113, at 533-34.

156. Bethlehem, *supra* note 117, at 4.

right to act in self-defense against non-state actors is established in customary international law.¹⁵⁷

2. *The Parameters of Self-Defense*

The parameters for invoking self-defense are derived from the previously mentioned *Caroline* incident,¹⁵⁸ specifically that self-defense is only justified where there exists "a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation . . . since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it."¹⁵⁹ As confirmed by the ICJ,¹⁶⁰ from here we can distill the twin pillars of necessity and proportionality. However, for the purposes of clarity, the controversial concept of immediacy is extracted from necessity and given separate treatment.

i. *Immediacy*

Immediacy requires a temporal connection between an initial armed attack and the exercise of self-defense.¹⁶¹ An armed attack is the touchstone of self-defense.¹⁶² Notwithstanding the U.S.' perceived security interests regarding threats to the United States from Al-

157. DAVID J. HARRIS, *CASES AND MATERIALS ON INT'L LAW* 748 (7th ed. 2010); Farley, *supra* note 4, at 77; Michael N. Schmitt, "Change Direction" 2006: *Israeli Operations in Lebanon and the International Law of Self-Defense*, 29 MICH. J. INT'L LAW 127, 145 (2008); Christian Tams, *The Use of Force against Terrorists*, 20 EJIL 359, 394 (2009).

158. Jennings, *supra* note 133, at 89-91; GRAY, *supra* note 101, at 148-49.

159. Jennings, *supra* note 133, at 89-91 (citing Letter from U.S. Sec'y of State Daniel Webster to Henry S. Fox, Esq., Envoy Extraordinary and Minister Plenipotentiary of Her Britannic Majesty (Apr. 24, 1841), reprinted in (1857) 29 BFSP 1129, 1138).

160. Nicaragua, *supra* note 101, at 103; *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. 161, at 183 [hereinafter "Oil Platforms"]; *Armed Activities*, *supra* note 107, at 223.

161. Lubell, *supra* note 8, at 44; Franck, *supra* note 144, at 840 (arguing that it is contrary to logic and inconsistent with the *travaux préparatoires* of the U.N. Charter to argue that the right to self-defense ended on September 11, 2001 after the armed attack ended).

162. DINSTEIN, *supra* note 106, at 193.

Qaeda, unless the initial attack reaches the standard of an “armed attack,” the ensuing response is not justified in self-defense.¹⁶³

In *Nicaragua*,¹⁶⁴ it was stated that to constitute an “armed attack,” the attack must constitute more than a “mere frontier incident.”¹⁶⁵ Absent further judicial pronouncements, there is a strong argument that this standard could be transferred to situations of self-defense.¹⁶⁶ It is clear that the acts of terrorism perpetrated by Al-Qaeda on 9/11 qualify as an “armed attack.”¹⁶⁷ However, there are inherent difficulties with relying on such an attack.

First, immediacy is not synonymous with “instant”¹⁶⁸ and effective military deployment requires time.¹⁶⁹ Despite this, commentators argue that, for example, even drone strikes perpetrated in 2002 lacked the imminence to justify self-defense.¹⁷⁰ Therefore, a strike ten years after the initial armed attack struggles to qualify as self-defense.

Second, there are fundamental difficulties in establishing a nexus between the original armed attacks of Al-Qaeda, namely the attacks against the *USS Cole* and 9/11, and Al-Aulaqi or AQAP in Yemen. For example, AQAP has been described as a separate entity from the central Al-Qaeda.¹⁷¹ Furthermore, while Judicial Watch, an NGO

163. *Armed Activities*, *supra* note 107, at 223-24.

164. *Nicaragua*, *supra* note 101.

165. *Id.* at 101, 103; *Oil Platforms*, *supra* note 161, at 186-87.

166. Lubell, *supra* note 8, at 49-50; Cf. DINSTEIN, *supra* note 106, at 212, who argues that even some frontier incidents, resulting in the loss of lives or other serious consequences, should constitute an armed attack. This article respectfully responds to Dinstein with the argument that a lower standard would be inconsistent with the purposes of Article 2(4).

167. GRAY, *supra* note 101, at 202. The attacks received condemnation from the Security Council on two separate occasions. See S.C. Res. 1368, *supra* note 129 & S.C. Res. 1373, *supra* note 130.

168. As per the original Caroline Test. Jennings, *supra* note 133, at 89-91.

169. Franck cites the UK exercise of self-defense in the Falklands/Malvinas as an example of time needed to deploy military forces effectively. Franck, *supra* note 145, at 840.

170. *E.g.* Downes, *supra* note 113, at 286 (rejecting the right of self-defense in relation to the 2002 Yemen strike against the alleged perpetrators of the *USS Cole* attack).

171. Farley, *supra* note 4, at 59; U.S. Department of State, *Country Reports of Terrorism 2011* (July 31, 2012), <http://www.state.gov/j/ct/rls/crt/2011/>

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advocating high standards of ethics in political and judicial activity, recently released a document suggesting that Al-Aulaqi bought flight tickets for the 9/11 hijackers, the United States has strongly refuted such claims, particularly noting that the document was highly redacted.¹⁷² While the evidentiary value of such document is weak, the U.S. justification provides an opportunity to navigate around such underlying difficulties by relying on Al-Qaeda's continuing intent to attack.¹⁷³

Due to the difficulties in attribution noted directly above, the following analysis focuses on the AQAP's continuing intent to attack the U.S. AQAP's continuing intent is evidenced by incidents such as the 2009 Christmas Day attempted "Shoe-bombing."¹⁷⁴ Attacks such as this give the U.S. its strongest claim of invoking self-defense to justify its killing of Al-Aulaqi.

AQAP's continued intent to attack the U.S. was consequently used to support the addition of Al-Aulaqi to a presidentially authorized "kill list" in April 2010, leading to his eventual death in September 2011. This "continuing intent" justification holds that the United States is acting to prevent future attacks against U.S. persons and interests from Al-Qaeda's "continuing intent" to attack the United States. The main controversy is that this justification requires the acceptance of the much-disputed concept of "anticipatory self-defense" and potentially the further controversial "pre-emptive self-defense." This article endorses the distinction that anticipatory action is taken "with a specific event that is known to be approaching," and

195553.htm#AQ; John Rollins, *Summary to Cong. Research Serv., R41070, Al-Qaeda and Affiliates: Historical Perspective, Global Presence and Implications for US Policy* (2011), <http://fpc.state.gov/documents/organization/156542.pdf>.

172. Catherine Herridge, *FBI refutes claims it suspected al-Awlaki role in purchasing 9/11 hijackers' tickets*, Fox News, Jan. 4, 2013, <http://www.foxnews.com/politics/2013/01/04/fbi-refutes-claims-it-suspected-al-awlaki-role-in-purchasing-11-hijackers/>.

173. DOJ White Paper, *supra* note 32, at 8.

174. The Congressional Research Service notes that recently "AQAP has targeted the U.S Embassy in Sana'a and the Saudi royal family, and has made at least two unsuccessful attempts to bomb airlines over U.S. airspace (Christmas Day 2009, Parcel bombs October 2010)." However, it is noted that the Sana'a embassy attack was in September 2012. SHARP, *supra* note 111, at 8.

pre-emptive action is that “taken in the absence of information of a specific future event.”¹⁷⁵

While the *Caroline* test¹⁷⁶ clearly legitimizes the use of anticipatory self-defense,¹⁷⁷ a deep divide has permeated legal discussion for the past century regarding whether this form of the right survived into the Charter-era. Read literally, Article 51 is contingent on the occurrence of an “armed attack,” and jurists such as Crawford¹⁷⁸ and Brownlie¹⁷⁹ believe that Articles 2(4) and 51 are necessarily exhaustive to prevent the proliferation of unilateral force. This view is supported by the *travaux préparatoires* of the U.N. Charter, which commentators claim considered *neither* anticipatory nor pre-emptive self-defense.¹⁸⁰

In contrast, there is strong support¹⁸¹ for the proposition that anticipatory self-defense in response to an imminent armed attack is still recognized under customary international law, with proponents arguing that the *Caroline* test has survived into the Charter-era.¹⁸² The

175. Lubell, *supra* note 8, at 55.

176. See *supra* text accompanying notes 132-35.

177. Jennings, *supra* note 134, at 89-91 (legitimizing self-defense where the government shows “a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation”) *Id.* at 89.

178. BROWNLIE’S, *supra* note 106, at 750.

179. IAN BROWNLIE, INTERNATIONAL LAW AND USE OF FORCE BY STATES, 112-13 (1st ed. 1963).

180. Albrecht Randelzhofer, *Article 51*, in THE CHARTER OF THE UNITED NATIONS, A COMMENTARY, 661-78, 675-76 (Bruno Simma ed., 1994). Although, it is noted such a reference has been removed from the current commentary. Albrecht Randelzhofer and Georg Nolte, *Article 51*, in THE CHARTER OF THE UNITED NATIONS, A COMMENTARY, 1397-1428, 1421-24 (Bruno Simma et al. eds., 3d ed., 2012).

181. Christopher Greenwood, *Self Defence*, in MAX PLANCK ENCYCLOPAEDIA OF INTERNATIONAL LAW, ¶ 45 [hereinafter *Self Defence*].

182. Derek Bowett, *Self-Defence in International Law* 188-89 (1958). The UK Government also supported the customary formulation of self-defense surviving following the UN Charter, although only to the extent of self-defense against an imminent threat. 660 PARL. DEB., H.L. (6th Ser.) (2004) 356, 370 (U.K.) available at http://www.publications.parliament.uk/pa/ld200304/ldhansrd/vo040421/text/40421-07.htm#40421-07_head0 [hereinafter PARL. DEB]; Bethlehem, *supra* note 117, at 4.

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UN High-Level Panel on Threats, Challenges and Change¹⁸³ and the UN Secretary General support this proposition.¹⁸⁴

Notwithstanding, there is still opposition to absolute confirmation of the doctrine from distinguished academics such as Gray¹⁸⁵ and Greenwood.¹⁸⁶ These academics note that the World Summit Outcome adopted by the General Assembly in 2005¹⁸⁷ and the ICJ are silent on the subject.¹⁸⁸

After documenting the continued controversy over anticipatory self-defense, it is not surprising that the doctrine of pre-emptive self-defense has received widespread disapproval.¹⁸⁹ Generally, there is a negative attitude about this doctrine, identifiable in State practice,¹⁹⁰ *opinio juris*,¹⁹¹ and jurist opinions.¹⁹² This negative attitude is attributable to the fear, enunciated by the UN Secretary General, that

183. U.N. Secretary-General, *High-Level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility*, ¶¶ 188-192, U.N. Doc. A/59/565 (Dec. 2, 2004) [hereinafter "*High-Level Panel*"].

184. UN Secretary-General, *In Larger Freedoms: Towards Development, Security and Human Rights for All*, ¶ 125, U.N. Doc. A/59/2005 (Mar. 21, 2005).

185. GRAY, *supra* note 101, at 165.

186. *Self Defence*, *supra* note 182, ¶ 50.

187. UN General Assembly, World Summit Outcome, UN Doc. A/Res/60/1, Oct. 24, 2005.

188. Nicaragua, *supra* note 101, paras. 35, 194; *Armed Activities*, *supra* note 106, at 222.

189. Also referred to as the "Bush Doctrine." See *supra* part I.

190. One pertinent example is the Israel bombing of Iraq's Osirak nuclear facility in 1982, where the international community rejected Israel's invocation of self-defense against an attack that was merely hypothetical; Farley, *supra* note 4, at 82.

191. The UK position is that "international law permits the use of force in self-defense against an imminent attack, but does not authorize the use of force to mount a pre-emptive strike against a threat that is more remote." PARL. DEB, *supra* note 183, at 370.

192. Lubell, *supra* note 8, at 62; Bethlehem, *supra* note 117, at 3; Randelzhofer, *supra* note 181, at 1423; see also Rosalyn Higgins, *The Attitude of Western States Towards Legal Aspects of the Use of Force*, in THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 435, 441 (Antonio Cassese ed., 1986); Elizabeth Wilmshurst, *Principles of International Law on the Use of Force by States in Self-Defence* (Chatham House, Working Paper Series 8-9, 2005); BROWNIE'S, *supra* note 106, at 752; GRAY, *supra* note 101, at 164-65; Thorpe, *supra* note 100, at 10.

preemption may result in disregarding the *jus cogens*' prohibition on force.¹⁹³ Therefore, this article argues that pre-emptive self-defense is unlawful under the *lex lata*, even against the challenging and fluid concept of non-state actors.¹⁹⁴

Assuming, for the sake of argument, that anticipatory self-defense is legal, the justifiability of the Al-Aulaqi strike under the parameter of imminence requires an analysis of whether the strike was anticipatory or preemptive. It may be that the United States was acting to prevent a specific armed attack that Al-Aulaqi was en-route to performing when Hellfire missiles hit his jeep. But, the United States has not disclosed this information.¹⁹⁵ Logically speaking, if such intelligence existed, capable of exculpating the United States, surely this would have been publicly stated by the administration. Because specific details of the strike on Al-Aulaqi have not been revealed, we must look to the general justification for "targeted killings" provided by the DOJ White Paper's conception of "imminence." This conception "does not require clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future."¹⁹⁶

If "*clear* evidence" is taken as the operative phrase, it could be argued that the United States had *some* evidence of a specific attack approaching, but not concrete evidence. This may be justifiable under anticipatory self-defense. However, the addition of Al-Aulaqi to the "kill list" months before the U.S. strike against him militates against a finding that the United States had *any* evidence of a "specific event known to be approaching."¹⁹⁷ This final fact of adding Al-Aulaqi to the "kill list" months before may provide evidence of the strike crossing into the unlawful realm of pre-emptive self-defense. However, in lieu of concrete facts regarding the attack and the intelligence behind it, this article can merely speculate and extrapolate arguments from the U.S. policy.

193. *High-Level Panel*, *supra* note 184, ¶¶ 188-192.

194. Randalzhofer, *supra* note 181, at 1423.

195. Lubell makes a similar argument in relation to the 2002 strike against the alleged perpetrators of the *USS Cole* incident. Lubell, *supra* note 8, at 177.

196. DOJ White Paper, *supra* note 32, at 7. .

197. Lubell, *supra* note 8, at 55.

ii. *Necessity*

In addition to imminence of an armed attack, necessity requires that the United States "must have no other option in the circumstances than to act in forceful self-defense."¹⁹⁸ Regarding the Al-Aulaqi strike, this means that the United States exhausted all means to prevent an imminent armed attack, including entering diplomatic discussions with Yemen to ask the state for either consent to strike, or to exercise Yemen's own jurisdiction by apprehending Al-Aulaqi. However, the United States states that where diplomatic efforts are made, but the territorial state is "unwilling or unable" to prevent further threats emanating from its territory, force is legitimate under international law.¹⁹⁹ Some commentators struggle to find a place for the United States' "unwilling or unable" doctrine.²⁰⁰ However, this "unwilling or unable" doctrine was taken as grounded in international law as an element of necessity, even prior to 9/11.²⁰¹

In applying this doctrine, it must first be noted that Yemen was certainly "willing" to bring Al-Aulaqi to justice, placing him on trial *in absentia*²⁰² and was actively pursuing him.²⁰³ However, a question

198. BROWNIE'S, *supra* note 106, at 749; *see also* Nicaragua, *supra* note 101, at para. 267; Special Rapporteur on State Responsibility, *The internationally wrongful act of the State, source of international responsibility (Part I) (concluded)*, Int'l Law Comm'n, U.N. Doc A/CN.4/318/Add. 5-7, at 69, para. 120 (1980) (by Robert Ago) ("The reason for stressing that action taken in self-defence must be necessary is that the State attacked . . . must not, in the particular circumstances, have had any means of halting the attack other than recourse to armed force.")

199. DOJ White Paper, *supra* note 32, at 5.

200. ELSEA, *supra* note 34, at 7-8 (concluding that it is not clear whether the test is "separate from the Caroline test, an additional consideration, or a substitute for one of the factors, perhaps immediacy in the case of a continuing threat.").

201. Randelzhofer, *supra* note 181, at 673; *see also* Ashley Deeks, PAKISTAN'S SOVEREIGNTY AND THE KILLING OF OSAMA BIN LADEN, 15(11) ASIL Insights 5 (2011); Bethlehem, *supra* note 117, at 7.

202. Hamza Hendawi & Ahmed Al-Haj, *Yemen Charges U.S. Born Muslim Radical Cleric Al-Awlaki*, WASHINGTON POST, Nov. 2, 2010, at <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/02/AR2010110200458.html>

203. *Yemen Orders Arrest of U.S.-Born Radical Cleric Awlaki*, FOX NEWS, Nov. 6, 2013, at <http://www.foxnews.com/world/2010/11/06/yemen-orders-arrest-born-radical-cleric-awlaki/>.

remains as to whether Yemen was *able* to effectively deal with the threat posed by Al-Aulaqi.

In 2011, Yemen was an economically weak state.²⁰⁴ In terms of governmental power,²⁰⁵ Yemen faced the uprising dubbed the “Arab Spring.”²⁰⁶ Furthermore, it had failed on multiple occasions to prevent Al-Qaeda’s attempts to attack the United States, namely the failed 2009 Detroit Christmas Day shoe-bomber²⁰⁷ and the 2010 “parcel bomb” plot.²⁰⁸ Because of Yemen’s status as a weak state, its previous failures to prevent Al-Qaeda’s attempts to attack the U.S., and in lieu of further guidance from international law on the unwilling or unable doctrine,²⁰⁹ an argument could cogently be made that the strike against Al-Aulaqi was necessary.

iii. *Proportionality*

Proportionality is an elusive concept because it is a context-specific term, with nuances attributable to its particular usage under *jus ad bellum*, *jus in bello*, and the IHRL.²¹⁰ Because this chapter concerns *jus ad bellum*, proportionality requires balancing the action taken by the state in self-defense, with the means necessary to end an

204. The World Bank identified Yemen’s 2011 GDP per capita at \$2,333. *World Bank, Yemen Republic: Data* at <http://data.worldbank.org/country/yemen-republic>.

205. *Id.* Albeit not classified as a failed state, Yemen was ranked as the thirteenth most critical state in the world by *Foreign Policy*. The 2012 Failed States Index – Interactive Map and Rankings, FOREIGN POLICY, http://www.foreignpolicy.com/failed_states_index_2012_interactive.

206. SHARP, *supra* note 110, at 4. (“[A] youth-led popular demonstration movement [that] challenged President Saleh’s rule in Yemen.”)

207. Sanctions Comm., *supra* note 21. This failed attack involved a man attempting to ignite an explosive device while aboard a Trans-Atlantic Northwest Airlines Flight scheduled to land in Detroit. *Id.*

208. Erika Solomon, et al., *Al-Qaeda Yemen wing claims parcel plot, UPS crash*, REUTERS, Nov. 5, 2010, <http://www.reuters.com/article/2010/11/05/us-usa-yemen-bomb-idUSTRE6A44PU20101105>. This incident involved the airfreight of two bombs sent from Yemen to the United States. The devices did not detonate because UK authorities in Dubai intercepted and defused the bombs. *Id.*

209. Thorpe, *supra* note 100, at 11.

210. DINSTEN, *supra* note 106, at 232.

ongoing danger,²¹¹ with the requirement that the action be directed specifically at the non-state actor, as opposed to any installations belonging to Yemen.²¹²

In the case of Al-Aulaqi, the strike was specifically targeted against the jeep in which he was known to be traveling, in order to end the on-going danger he *personally* posed. The UN accepted the designation of Al-Aulaqi as a senior operational leader of Al-Qaeda, noting his involvement in the attempted 2009 shoe-bombing attempt against the United States.²¹³ Therefore, there is a strong argument to support the proposition that the incursion into Yemeni territory, to prevent the ongoing danger posed by Al-Aulaqi, was proportionate.

D. Conclusion

The framework of *jus ad bellum* appears to be undergoing a paradigm shift since the armed attack perpetrated by Al-Qaeda on 9/11. While Article 2(4) appears to have retained its status as a cornerstone of international law, the traditional view of the exhaustive nature of Article 51 is slowly dissipating under the pressure from those favoring a progressive interpretation, particularly following 9/11, to allow anticipatory self-defense directed at non-state actors. Such views appear to be well-founded in the customary right to self-defense existing parallel to the Charter. However, great debate remains, consequently preventing the confirmation of the progressive approach.

The scarcity of publicly available information surrounding the Al-Aulaqi killing provides difficulties in the application of the self-defense parameters. However, strong arguments can be deduced, from known facts and the U.S. legal justifications, to conclude that it would be difficult for the United States to justify the strike under the rules of *jus ad bellum*, particularly on the basis of the criteria of imminence to an armed attack. In lieu of a statement by United States

211. Lubell, *supra* note 8, at 65; BROWNIE'S, *supra* note 106, at 749; *Self Defence*, *supra* note 182, at paras. 27-28.

212. Oil Platforms, *supra* note 161, at 198 (holding that even if the U.S. could have invoked self-defense to justify the attack on Iranian oil platforms, the attack would have been disproportionate as there was no link between an armed attack and the oil platforms).

213. Sanctions Comm., *supra* note 21.

or Yemeni officials revealing the intelligence behind the strike, or whether Yemen consented to the strike, the issue remains shrouded in uncertainty.

CONCLUSION

Part I of this two-part article sought to lay the foundations for this article's proposition, via an analysis of the legal justifications for targeted killing forwarded by the United States, before addressing the first set of legal issues identified under the framework of *jus ad bellum*. However, the most divisive issues surrounding the targeted killing of Anwar Al-Aulaqi are to be explored in Part II of this article, which will address the remaining frameworks of *jus in bello* and IHRL. The analysis in Part II develops the overall thesis proposed by this author, namely that the targeted killing of Anwar Al-Aulaqi must be evaluated under both the rules of *jus ad bellum* and the "law enforcement" paradigm of IHRL. The implications of the analysis propounded in Part II are great: if the rules of *jus in bello* dictate that the stricter "law enforcement" paradigm of IHRL is to apply to targeted killings in States such as Yemen and Pakistan, serious questions surround the use of "targeted killing" as a tool in the arsenal of the United States in their war against Al-Qaeda. Such operations would be subject to the restrictive requirement to respect the right to life, and there would be no room for collateral damage. In sum, the large majority of drone strikes would be unlawful. In applying these two frameworks, a final conclusion will be reached with regards to the legality of the strike against Al-Aulaqi.